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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**THE PEOPLE,**

**Plaintiff and Respondent,**

**v.**

**ANGEL ARIAS,**

**Defendant and Appellant.**

**A104931**

**(Solano County  
Super. Ct. No. FCR181871)**

Appellant Angel Arias was convicted after a jury trial of the crimes of forcible rape (Pen. Code, § 261, subd. (a)(2)); simple kidnapping (Pen. Code, § 207, subd. (a)); forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)); assault and battery (Pen. Code, §§ 240, 242) and inflicting corporal injury on a spouse or cohabitant (Pen. Code, § 273.5, subd. (a)). Appellant contends: (1) his new trial motion should have been granted, because he was denied effective assistance of counsel at trial, when his counsel failed to call an expert in an attempt to show that the vaginal injuries to the rape victim were relatively slight; and (2) the trial court erred when imposing a no contact order barring appellant from contacting the victim, his former girlfriend.

We conclude the order denying the motion for new trial should be affirmed, because there was no prejudicial ineffectiveness of trial counsel, and the challenge to the no contact order was waived in the trial court by failure to object.

## I. FACTS AND PROCEDURAL HISTORY

We are familiar with the facts of this case as a result of the previous appellate proceedings in our court. We summarize the facts of the offense and the prior appellate proceedings for purposes of providing background to the issues presented in the latest appeal. Appellant met the victim, Mary E., and he became involved in a relationship with her from June 1994 until September or October 1996, when she informed him that she wanted to end their relationship. After 1996, the victim continued to see appellant off and on, although she did not consider herself romantically involved with him after 1996.

In October 1996, the victim moved from Contra Costa County to Solano County. Thereafter, she continued to see appellant occasionally. Sometimes he would show up unexpectedly at her work. There also were instances when he would come to her residence without warning, at times late at night. Appellant had a key to the victim's garage door and would enter the house in that manner.

In July 1998, the victim asked appellant to return her garage key, which he did. After that, he did not show up at her house for approximately three months. From July 1998 to March 2000, appellant never came to her residence in the middle of the night, although on several occasions he had asked Mary E. to renew their relationship, and on at least one occasion she engaged in sex with him. Prior to March 12, 2000, the day of the incident, the victim had not seen appellant for two or three weeks.

On the evening of March 11, 2000, the victim had consumed about three or four beers before she went to bed. She was living alone at the time. She believed the entries to her residence were secured before going to sleep that night. At about 1:00 a.m. on March 12, the victim woke up, turned over, and saw appellant standing next to her bed. She asked him how he had entered the house and what he was doing there. Appellant replied, "I'm an Angel, I can get in anywhere." Appellant climbed on top of Mary E., and said, "Tonight you're going to die." He then started choking her. He also told the victim that he could leave her body

someplace and there would be no links to who had done so. The victim struggled and eventually got away. Once the victim stood up, appellant grabbed her and started punching her in the ribs. Mary E. punched appellant back a few times. He eventually stopped hitting her.

Hoping to calm him down, Mary E. suggested they go downstairs so that she could have a cigarette. Appellant agreed. While smoking a cigarette outside the house, she did not attempt to run for help. While downstairs, appellant asked the victim if she wanted to go for a ride with him. The victim tried to decline, saying it was cold outside, but appellant told her that “if you don’t come with me willingly, I’ll take you forcibly.” He also told her, “You’re coming with me, let’s just go take a little ride.” The victim felt that she had no choice but to go with appellant.

As appellant led the victim around the side of the house, she picked up a piece of wood and tried to hit him with it. He grabbed the wood and tossed it away. Just before entering his truck, the victim started screaming. Appellant put a hand over her mouth and an arm around her neck. He then placed her in the truck, got in himself, and drove away. The victim suggested that they go to Denny’s restaurant because she was thirsty and her neck hurt. Instead, appellant drove toward the Air Force base and eventually parked on a dirt road in the countryside.

They got out of the truck and the victim told appellant she was cold. He gave her his jacket and suggested that they get into the covered truck bed and talk, which they did. Appellant told Mary E. that she had “driven him to this” by not returning his calls and not wanting to see him. He then asked if he could lick her genitals. Fearing that he might start hitting her again, the victim replied, “Sure.” Appellant removed the victim’s sweat pants and underwear and orally copulated her. He then said, “You want to have sex?,” to which she again told him, “Sure.” The victim remained terrified at the time and thought that, if she did what he wanted, he would let her go. They had vaginal intercourse and afterwards he asked why things could not return to the way they had been before. The victim

responded, “How can you have a relationship with somebody that you are terrorized of.” They remained parked for about 45 minutes and returned to the victim’s house at about 3:00 a.m. During the return trip, appellant asked if she was going to call the police and have him arrested. The victim said “No,” and appellant told her that if she did he would eventually “come back and finish the job,” which the victim interpreted to mean that he would kill her.

At the victim’s residence, appellant asked if he could stay the night and Mary E. did not say no, although she remained afraid of him. They went upstairs and got into bed together and he asked if they “could make love.” The victim responded, “You already did. Good night.” Appellant fell asleep, but the victim laid in bed shivering all night. She got up at about 7:30 a.m. while he was still sleeping. Mary E. called her daughter Michelle and left a voice mail message saying that appellant was there and that he had threatened her. She also asked Michelle to drive by the house and copy down his license plate number “in case anything happened to me.” The victim did not immediately call the police because she was convinced appellant would carry out his threat to return and kill her.

Michelle returned her mother’s call and the two had a very brief conversation. She then listened to her mother’s message and called “911.” The police, in turn, called Mary E. Shortly thereafter, the police arrived and found appellant asleep in bed. He was arrested.

Appellant was transported to the police department and advised of his *Miranda*<sup>1</sup> rights, which he waived. He made a taped statement to the police that was later played to the jury.

Mary E. was examined on the day of the incident by Elizabeth Cassinos, a registered nurse and the program coordinator of the Napa/Solano Sexual Assault Response Team. Cassinos observed multiple contusions on the victim’s arms, legs, hands, neck, back, and chest. The victim also had two areas of trauma on her genitals, which were consistent with nonconsensual intercourse and with the

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<sup>1</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

history she provided to Cassinos. The jury was shown slides of her injuries. Cassinos examined appellant that day and noticed fresh bruises and scratches on his arm, hand, and neck.

When Mary E. returned home from the hospital, she noticed that a window screen had been removed and placed nearby on the ground and that the screen door handle had been broken. Neither of them had been damaged the previous day. Her daughter testified that she also saw the damaged screens. The victim called the arresting officer, who returned to the house and observed the window screen had been removed and also observed the broken screen door handle.

The theory of the defense was that Mary E. lied about what had taken place and had consented to his sexual advances. The defense also argued that appellant was too intoxicated to have formed the criminal intent to commit the crimes. Appellant told the police that he had consumed five beers that night.

The Solano County District Attorney filed an amended information on May 2, 2000, charging appellant with aggravated kidnapping to commit forcible rape (Pen. Code, § 209, subd. (b)(1)<sup>2</sup>; count I) and forcible rape (§ 261, subd. (a)(2); count II), which included the allegation the victim was kidnapped for the purpose of committing rape (§ 667.8, subd. (a)). The information further charged appellant with first degree residential robbery (§ 459; count III); simple kidnapping (§ 207, subd. (a); count IV); and forcible oral copulation (§ 288a, subd. (c)(2); count V), which included the allegation the victim was kidnapped for the purpose of committing oral copulation. The information also charged appellant with corporal injury to a spouse or cohabitant (§ 273.5, subd. (a); count VI) and making terrorist threats (§ 422; count VII).

Jury trial commenced on April 12, 2001. On April 16th, the jury returned guilty verdicts on counts II, IV, V, and VI. With respect to count I, the jury acquitted appellant of aggravated kidnapping and convicted him of the lesser

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<sup>2</sup> All further references are to the Penal Code.

included offense of assault and battery. Appellant was acquitted on counts III and VII, and the allegations were found not true.

On June 19, 2001, after denying appellant's request to discharge retained counsel and appoint another defense attorney, the trial court sentenced appellant to 10 years 8 months in state prison, consisting of the six-year middle term on count II, a consecutive two year term on count V, a consecutive one-year and eight-month term on count IV, and a consecutive one-year term on count VI, each such consecutive term being one-third the middle term. The court dismissed the lesser included offense convictions on count I, the misdemeanor convictions, and imposed 534 days presentence credit. Appellant filed a notice of appeal on June 26, 2001.

On October 17, 2001, after the initial notice of appeal was filed, the trial court granted appellant's request to appoint counsel for purposes of filing a new trial motion. After a hearing, the motion was denied on April 23, 2002. Appellant also appealed that ruling. The two appeals were ordered consolidated.

On April 30, 2003, we issued a ruling, *People v. Arias*, case Nos. A095953 and A098766, an unpublished opinion, in which appellant's conviction was affirmed, but the case was remanded for appointment of counsel for the purpose of filing a motion for new trial, and for resentencing.

On remand after appointment of counsel, the motion for new trial was heard and denied on October 14, 2003. On November 19, 2003, the trial court imposed an identical sentence, i.e., 10 years 8 months in state prison, and granted 1,348 days presentence credit. Appellant filed a new notice of appeal on November 20, 2003.

## II. DISCUSSION

### A. APPELLANT WAS NOT ENTITLED TO A NEW TRIAL ON THE GROUNDS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant first maintains the trial court erred in denying his motion for new trial, on the ground that he was denied effective assistance of counsel at trial. He

argues trial counsel failed to adequately represent him because counsel should have called an expert to refute the opinion of the prosecution's expert, i.e., the nurse who had examined the victim shortly after the crime, and opined about her vaginal injuries.

1. Standard of Review

We do not decide this new trial issue de novo, but must exercise only a highly deferential standard of review. "In *People v. Fosselman* (1983) 33 Cal.3d 572 . . . our Supreme Court held that a trial court may consider inadequate assistance of trial counsel as a basis for a motion for a new trial." (*People v. Stewart* (1985) 171 Cal.App.3d 388, 391 (*Stewart*); § 1181.) "[T]he trial court's ruling on such a motion [for a new trial] rests so completely within [its] discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1252, internal quotation marks omitted; see *People v. Davis* (1995) 10 Cal.4th 463, 524 ["there is a strong presumption that it properly exercised that discretion"].) "A court may grant such a motion if and only if the defendant demonstrates the existence of an error or other defect that is reversible." (*People v. Clair* (1992) 2 Cal.4th 629, 667.)

2. The Record Regarding The New Trial Motion

Appellant's newly appointed counsel after his conviction, Thomas Hagler, filed two motions for new trial. The first motion, filed April 4, 2002, raised two claims: (1) trial counsel Richard Hove was ineffective for failing to investigate defenses and call an expert witness to dispute the prosecution's expert, the nurse who had examined the victim shortly after the crime; and (2) a claim of newly discovered evidence, later withdrawn.

The first claim was supported by three exhibits, namely, a declaration by Diane Hodges, R.N.; portions of the victim's trial testimony compiled by attorney Hagler; and a copy of the transcript of the victim's testimony.

The People filed opposition, and the motion was later denied. The trial court's ruling on this first new trial motion was as follows: "The Court, as I say, I've read and considered all of the submissions of counsel, both in writing now and orally today, and I . . . presided over the trial in this matter. And the Court at this time is going to deny the . . . request for new trial. [¶] . . . Number two, the calling of an expert certainly could have been a tactical decision by defense in that there was a tactical decision, for instance, not to put his client on the stand, a tactical decision what witnesses to call, and what Mr. Arias told the police which was admitted against him at trial. [¶] I think that's what, quite frankly, was the evidence. Even though the complaining witness did have some credibility issues, what Mr. Arias had to tell the police, which was admitted into evidence, certainly supports the jurors' finding. [¶] So the motion for new trial . . . will be denied."

A second motion for new trial was filed on September 23, 2003, and raised two other claims of ineffective representation not renewed on appeal, namely, counsel Hove's failure to argue or request an instruction regarding his client's reasonable belief as to the victim's consent. The motion also incorporated by reference the remaining claim and exhibits in the first new trial motion. The People filed opposition.

At the hearing, on October 14, 2003, appellant's counsel argued that, had an expert witness been called, "it would have provided important information to the jury that would have borne on that [complaining] witnesses [*sic*] credibility." The trial court denied the motion, ruling as follows: "As I said, I have read and considered both the defense motion and the People's responsive motion. And at this time, the Court is going to deny the motion for new trial. I don't find any good cause to grant same."

### 3. Appellant Has Not Established Ineffective Counsel or Prejudice.

Appellant contends trial counsel was ineffective because he failed to investigate and call a defense expert to refute the testimony of the nurse who had examined the victim on the day of the assault.

An appellant who contends he received ineffective assistance has the burden of proving that (1) trial counsel's performance was deficient in that it fell below an objective standard of reasonableness when measured by prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215-218 (*Ledesma*); see also *In re Dennis H.* (2001) 88 Cal.App.4th 94, 98.)

On direct appeal, an appellant bears an especially heavy burden of proof: “[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,’ the claim on appeal must be rejected.” (*People v. Wilson* (1992) 3 Cal.4th 926, 936, quoting *People v. Pope* (1979) 23 Cal.3d 412, 426 (*Pope*); see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.) Appellant thus has the “demanding” burden of establishing both ineffective assistance of counsel, and prejudice. (*People v. Carter* (2003) 30 Cal.4th 1166, 1211 (*Carter*).)

“In assessing claims of ineffective assistance of trial counsel, [the court] consider[s] whether counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms and whether the [appellant] suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *Ledesma, supra*, 43 Cal.3d at p. 217.) A reviewing court will indulge in a presumption that counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy. [Appellant] thus bears the burden of establishing constitutionally inadequate assistance of counsel. (*Strickland v. Washington, supra*, at p. 687; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.) If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected

unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus. (*Id.*, at pp. 266-267.)” (*Carter, supra*, 30 Cal.4th at p. 1211.)

Appellant has not met this demanding standard for at least two reasons: (1) the record on appeal is silent regarding the reasons for trial counsel’s acts or omissions; and (2) the evidence and exhibits he now relies on fail to establish either incompetence or prejudice. (See *In re Cox* (2003) 30 Cal.4th 974, 1016 [“The incompetence must have resulted in a fundamentally unfair proceeding or an unreliable verdict.”] (*Cox*).)

First, appellant’s claim must be rejected because “the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged.” (*Carter, supra*, 30 Cal.4th at p. 1211.) Trial counsel was not asked for an explanation, did not testify at the hearing, and did not provide a declaration in support of the motion for new trial. (*Ibid.*) Because the record does not show whether counsel had a tactical reason for failing to call the proposed expert, the claim ““is more appropriately decided in a habeas corpus proceeding.”” (*People v. Jones* (2003) 30 Cal.4th 1084, 1105; *Pope, supra*, 23 Cal.3d at p. 426.)

Nevertheless, the record contains a possible reasonable explanation for trial counsel’s alleged omission. While trial counsel might have called an expert whose opinion concerned solely the victim’s vaginal injuries, as now proposed by appellant, such testimony would not have aided appellant on the crucial issues in the case. The prosecution could have highlighted for the jury, by way of cross-examination, the limitations of the expert’s opinion that neglected to address other painful injuries appellant inflicted on the victim, which reasonably caused her to fear appellant and thus give in to his demands for sexual relations. We also note that the trial record demonstrates that trial counsel performed competently in other respects. Although appellant was facing a life sentence if convicted of all

charges, counsel successfully convinced the jury that the most serious counts had not been proven.

Appellant contends in his reply brief that no competent counsel would have forgone the chance to present a defense expert on this issue, and there could be no tactical reason for such an omission. However, there are many tactical reasons that would implicate the decision to call or not call such a witness, including counsel's tactical judgment as to whether such testimony would be helpful or not, in light of the other evidence that appellant used force or duress against the victim, and the often unpredictable consequences of cross-examination. Trial counsel's performance must be viewed with deference. He was not required to raise every possible issue, especially those which are not likely to succeed. (See *Carter, supra*, 30 Cal.4th at p. 1211.) Here, counsel could conclude as a tactical matter that it made little sense to contest whether the victim had suffered injuries during a sexual encounter with appellant.

Another weakness in appellant's argument is that the proffered declaration of Diane Hodges, R.N., fails to back up appellant's claim that the victim's and examining nurse's testimony would have been undermined. Hodges did not personally examine the victim. (See *Stewart, supra*, 171 Cal.App.3d at p. 397.) Nor did she personally observe the victim's injuries, many of which might not be fully revealed in photographs. And she acknowledges the photographs disclose that the victim suffered "slight injury" to her vagina, which essentially corroborates the prosecution's expert.

The apparent purpose for calling a defense expert would be to establish that appellant's admitted act of intercourse with the victim was not accomplished by physical force. However, that was not even the main contested issue at trial. The issue at trial was whether the victim had consented to the sex acts or had acquiesced under duress, after force had been applied to her in other respects. Mary E. testified that she complied with appellant's demand for intercourse, but she only did so out of her fear that appellant would kill her if she resisted, based

upon his repeated threats to kill her if she did not comply with his demands for sex, and the beating she had sustained at his hands in her bedroom, where appellant had throttled and punched her repeatedly in the ribs because she tried to escape. Hodges's declaration did not address these issues, as well as photographs of the victim's injuries that resulted from punches and choking, which were significant evidence as to the use of force and duress.

It was uncontested that Mary E. had visible bruises and scratches on her neck, throat, arms, back, thigh, and ribs. Both the officer who first saw Mary E. and the nurse who examined her testified they had seen visible marks of force on the victim's body. The examining nurse also opined that many of the bruises were finger marks that were consistent with being held very tightly. Mary E. testified her ribs were sore for weeks from being punched, and she had neck pain from being throttled. The jury was shown photographs of her injuries. Thus, the examining nurse's opinion regarding trauma to the victim's genitalia was not the only, or most important, evidence of duress or force. It was never suggested the defense expert's testimony would address any of these other injuries.

Appellant also has not shown he was prejudiced by the omission of testimony from a defense expert on this issue. As we have indicated, other evidence showing that appellant used duress and force against his victim was most compelling, and would have been unaffected by testimony from the defense expert appellant now contends should have been called. Appellant has not met his burden of showing a reasonable probability of a more favorable outcome had such an expert been called. (See *Cox, supra*, 30 Cal.4th at p. 1020.) The trial court therefore did not abuse its discretion in denying the motion for new trial. (*People v. Farmer* (1989) 47 Cal.3d 888, 917.)

**B. ANY ERROR IN IMPOSING THE "NO CONTACT" ORDER WAS WAIVED BY APPELLANT'S FAILURE TO OBJECT.**

Appellant's remaining issue on appeal raises the question of whether the trial court erred in imposing a "no contact" order at sentencing. Appellant claims

this was error, because he was sent to prison and was not granted probation. Although appellant did not object to this order in the trial court, he now asks that we strike this no contact order from the abstract of judgment.

At the first resentencing, on April 23, 2002, the trial court stated, in relevant part, “He’ll have no contact -- well, she’s not a minor.” At the second resentencing, the trial court ordered appellant to have “no contact” with the victim.

Appellant never objected to the trial court’s statement or order barring contact with Mary E. As a result, this claim of error was not preserved for purposes of appeal. Absent his objection in the lower court, the issue was waived. “As a general rule, only ‘claims properly raised and preserved by the parties are reviewable on appeal.’” (*People v. Smith* (2001) 24 Cal.4th 849, 852 (*Smith*); *People v. Welch* (1993) 5 Cal.4th 228, 237 (*Welch*).)

Appellant does not contend his counsel at the time of sentencing provided ineffective assistance in this regard, but claims he should be excused from the consequences of his failure to object and waiver, because the no contact order constituted an “unauthorized sentence.” However, a no contact order is not necessarily unauthorized in those instances where a prison sentence has been imposed. Such orders may be imposed in an appropriate case as a form of injunctive relief. In the present case, injunctive relief precluding appellant’s contact with his victim would have been appropriate, since there was testimony at trial that appellant threatened to kill Mary E. if she called the police, which she subsequently did; and appellant would have no legitimate need to contact her. The record of the sentencing hearing does not provide any arguments, evidence, or reasoning relating to this issue, because appellant failed to object to the no contact order imposed by the court.

Appellant’s failure to object meant that no factual record was created on this issue, and there is nothing for us to review. Under the circumstances, any error in this respect was waived. (See *Smith, supra*, 24 Cal.4th at p. 852; *Welch, supra*, 5 Cal.4th at p. 237.)

III. DISPOSITION

The judgment is affirmed.

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STEVENS, J.

We concur.

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JONES, P.J.

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GEMELLO, J.